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At the Cutting Edge of Labor Law Preemption: A Critique of Chamber of Commerce v. Lockyer

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I. Introduction

The topic of federal labor law preemption presents one of the densest thickets in all of labor and employment law. The Supreme Court, for example, has decided more cases touching on federal preemption than on any other legal issue in the field of collective bargaining.[1] These cases have yielded two distinct theories of labor law preemption. The *Garmon* strand of preemption precludes the states from regulating conduct that is arguably protected or prohibited by the National Labor Relations Act (NLRA).[2] The *Machinists* strand, meanwhile, preempts state law that intrudes on areas that Congress intended to leave to the free play of economic forces.[3] These preemption theories, in turn, are subject to a dizzying variety of exceptions.[4] The resulting legal landscape is meandering at best. As Justice Frankfurter once remarked, the contours of labor law preemption are "of a Delphic nature, to be translated into concreteness [only] by the process of litigating elucidation."[5]

This need for elucidating litigation is fueled as new contexts arise to test the reach of these two labor law preemption doctrines. California Assembly Bill 1889 (AB 1889), enacted by the California legislature effective in 2001, provides one such context. This new statute, codified as sections 16645 to 16649 of the California Government Code,

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1. *See* ARCHIBALD COX ET AL., LABOR LAW: CASES AND MATERIALS 937 (13th ed. 2001); *see also* Henry H. Drummonds, *The Sister Sovereign States: Preemption and the Second Twentieth Century Revolution in the Law of the American Workplace,* 62 FORDHAM L. REV. 469, 560, n. 509 (reporting a Westlaw search finding that more than ninety Supreme Court decisions between 1943 and 1993 contained a substantial discussion of labor law preemption issues).

2. *See infra* notes 23–40 and accompanying text. The NLRA is codified at 29 U.S.C. §§ 151–169.

3. *See infra* notes 41–56 and accompanying text.

4. See Stephen F. Befort, *Demystifying Federal Labor and Employment Law Preemption,* 13 LAB. LAW. 429, 430–34 (1998).

5. Machinists v. Gonzales, 356 U.S. 617, 619 (1958).

prohibits certain public employers, state grant recipients, and state contractors from using state-provided funds or property to assist, promote, or deter union organizing efforts.[6] In response to a constitutional challenge filed by the U.S. Chamber of Commerce and several other organizations, a California federal district court in *Chamber of Commerce v. Lockyer,*[7] ruled that the NLRA preempts certain key provisions of AB 1889. More precisely, in a terse, abbreviated opinion, the *Lockyer* court determined that AB 1889 runs afoul of both strands of NLRA preemption and is not saved by the market participant exception to preemption.[8] In a more thorough, albeit nonexhaustive opinion, the Ninth Circuit Court of Appeals recently reviewed the district court's decision and reached a largely similar result.[9] Specifically, the Ninth Circuit held that the sections of AB 1889 at issue are "regulations" that do not fall within the market participant exception[10] and that AB 1889 is preempted by the *Machinists* strand of preemption.[11] The appeals court did not analyze the statute under *Garmon,* as it concluded that its *Machinists* analysis provided sufficient grounds to find preemption.

The *Lockyer* litigation stands at the cutting edge of today's labor law preemption jurisprudence. The decision construes both strands of the two labor law preemption theories as well as the scope of the increasingly important market participant exception to preemption. The significance of the case is underscored by the broad array of intervenors and amici that participated on each side of the case, including, most notably, the National Labor Relations Board's General Counsel, who argued in favor of both the district court's and the Ninth Circuit's preemption conclusion.[12] The ultimate outcome of *Lockyer,* particularly if the Supreme Court chooses to review this case, likely will provide an important milepost in demarcating the proper boundary between federal and state interests in establishing labor policy.

This article undertakes a review and critique of the *Lockyer* litigation. In a nutshell, the district court and the Ninth Circuit both erred in deciding that federal labor law preempts AB 1889. Although the California legislation constitutes regulation rather than self-interested proprietary action, the substance of AB 1889 does not tread upon the

6. CAL. GOV'T CODE §§ 16645–16649 (West 2001).
7. 225 F. Supp. 2d 1199, 170 L.R.R.M. (BNA) 3185 (D.C. D. Cal. 2002).
8. *Id.* at 1204–06.
9. Chamber of Commerce v. Lockyer, 364 F.3d 1154 (9th Cir. 2004).
10. *Id.* at 1161–63.
11. *Id.* at 1168.
12. *See* National Labor Relations Board, Office of the General Counsel, *Labor Board Authorizes its General Counsel to Proceed on His Recommendation to Take Position in Ninth Circuit Case That Two Provisions of California Statute Are Preempted by NLRA* (May 29, 2003), available at http://www.nlrb.gov/press/releases/r2493.asp (last visited June 16, 2004).

exclusive federal enclaves carved out by either the *Garmon* or the *Machinists* strands of NLRA preemption.

This article proceeds in five parts. Part II introduces the doctrine of federal preemption as it applies to the NLRA, outlining both the *Garmon* and *Machinists* strands of preemption, as well as the market participant exception to federal preemption. Part III summarizes AB 1889 as well the district court and Ninth Circuit decisions. The remaining three parts analyze *Garmon, Machinists,* and the market participant exception as those doctrines apply to AB 1889. In particular, Part IV concludes that AB 1889 does not qualify for the market participant exception and therefore is subject to preemption analysis. Part V finds that AB 1889 is not preempted under the *Machinists* doctrine because it does not regulate conduct in an area that Congress intended to be left to the free play of economic forces. Finally, Part VI applies the *Garmon* strand of preemption to the *Lockyer* case and concludes that *Garmon* does not preempt AB 1889 since California's statute does not interfere with or frustrate the primary jurisdiction of the NLRB.

II. The NLRA and Federal Preemption

A. *General Principles*

A federal system of government necessarily involves a tension in the delegation of power between state and federal governments. Under the U.S. Constitution, this tension is principally resolved through the Supremacy Clause, which states, "This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[13] The Supremacy Clause authorizes, but does not compel, Congress to preempt state law.[14] Given the permissive nature of federal preemption, "the purpose of Congress is the ultimate touchstone."[15] Putting a state law to the test of preemption requires one to seek out and draw upon the particular objectives of the federal statute to further its intended purposes. In this way, the preemption doctrine serves to invalidate state laws that would interfere with or frustrate the objectives of the federal scheme in question.[16] In general, federal laws preempt state and local laws in three circumstances: (1) when the federal law contains an express preemption provision; (2) when the state or local law is in actual conflict with the federal law; or (3) when there is no clear conflict, but Congress intended the federal law to "occupy the field."[17]

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13. U.S. CONST. art. VI, cl. 2.
14. *Id.*
15. Malone v. White Motor Corp., 435 U.S. 497, 504, 97 L.R.R.M. (BNA) 3147 (1978).
16. *See* Stephen F. Befort & Christopher J. Kopka, *The Sounds of Silence: The Libertarian Ethos of ERISA Preemption,* 52 FLA. L. REV. 1, 5–7 (2000).
17. Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372–73 (2000).

The NLRA governs labor-management relations in the private sector.[18] In enacting this statute, Congress obviously intended federal law to occupy, at least to some degree, the field of labor-management relations.[19] The NLRA, however, contains no express preemption provision, and it is clear that "Congress did not exhaust the full sweep of legislative power over industrial relations given by the Commerce Clause,"[20] and that courts, in general are "reluctant to infer preemption."[21] Notwithstanding this congressional silence, if a local regulation "conflicts with federal law or would frustrate the federal scheme," the courts will determine that the state law is preempted.[22]

The Supreme Court, in applying these principles, has recognized two strands of preemption under the NLRA. Through these separate, but complementary theories, the Court seeks to harmonize overarching federal labor policy with sometimes competing state interests.

B. *The* Garmon *Preemption*

In its landmark decision in *San Diego Building Trades Council Local 2620 v. Garmon,* the Court stated that the NLRA's preemptive orbit proscribes not just actual conflict with state law, but also state action that attempts to regulate conduct that is arguably either protected or prohibited by the NLRA.[23] The Court noted that when Congress enacted the NLRA, it created a "complex and interrelated federal scheme of law, remedy and administration."[24] Given the complex and interrelated nature of the Act, "the ultimate aim of the *Garmon* strand of preemption is to produce a uniform federal law governing labor relations under the auspices of a single regulatory body."[25]

The goal of uniformity in the law and administration of the Act is realized by deferring to the judgment of the Board whenever issues arise that involve conduct that is arguably protected or prohibited by the NLRA. Indeed, although *Garmon* can be credited with harmonizing and expanding the NLRA's preemptive scope, the following language from a pre-*Garmon* decision demonstrates that consistent interpretation and enforcement of the Act have long been a primary goal:

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18. 29 U.S.C. §§ 151–169 (2002).

19. *See* Wisconsin Dept. of Indus., Labor and Human Relations v. Gould, Inc., 475 U.S. 282, 286, 121 L.R.R.M. (BNA) 2737 (1986) (stating that "[i]t is now a commonplace that in passing the NLRA Congress largely displaced state regulation of industrial relations").

20. Weber v. Anheuser-Busch, Inc., 348 U.S. 468, 480 (1955).

21. Bldg. & Constr. Trades Council v. Associated Builders & Contractors of Massachusetts/Rhode Island, Inc., 507 U.S. 218, 224, 142 L.R.R.M. (BNA) 2649 (1993) [hereinafter *Boston Harbor*].

22. Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 209, 118 L.R.R.M. (BNA) 3345 (1985) (quoting *Malone*, 435 U.S. at 504).

23. 359 U.S. 236, 245, 43 L.R.R.M. (BNA) 2838 (1959).

24. *Id.* at 243.

25. *See* Befort, *supra* note 4, at 431.

> Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid those diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies. . . .[26]

The core of the *Garmon* preemption, accordingly, lies in the goal of preserving the Board's primary jurisdiction to interpret and administer the NLRA.[27] Indeed, the Supreme Court has gone so far as to rule that the *Garmon* theory invalidates state laws that provide a remedy not available to the Board, even when that remedy is assessed against a wrongdoer in a way that enforces, rather than contradicts, the substance of the NLRA.[28]

A working definition of the particular conduct that the NLRA protects or prohibits is of practical importance to *Garmon* analysis. Section 7 of the NLRA identifies three areas of protected conduct.[29] This section protects employees in their right to choose whether or not to (1) organize, form, join, or assist a labor union; (2) collectively bargain; and (3) engage in concerted activity for mutual aid or protection.[30] Because these activities are protected under the Act, a state cannot validly adopt regulations or assert state court jurisdiction pertaining to conduct that arguably falls into one of the three categories. Thus, the Supreme Court has ruled that a state court's injunction issued against peaceful picketers is preempted since such conduct constitutes protected "concerted activity."[31] The Court similarly has invalidated a state licensing statute that restricted the right of employees to freely choose their bargaining agent, another protected section 7 right.[32]

The NLRA also prohibits various "unfair labor practices" committed by either employers or labor unions. With respect to employers, section 8(a) of the NLRA generally bans conduct that interferes with employees' rights to organize, bargain collectively, or engage in protected concerted activities.[33] Section 8(b) of the NLRA also bans certain union activities such as interfering with an employee's section 7 rights

26. Garner v. Teamsters Local 776, 346 U.S. 485, 489, 33 L.R.R.M. (BNA) 2218 (1953).

27. *See* Befort, *supra* note 4, at 431.

28. *See Gould*, 475 U.S. at 282 (finding preempted a state law that disqualified certain NLRA violators from eligibility for state contracts).

29. *See* 29 U.S.C. § 157 (2002).

30. *Id.*

31. Youngdahl v. Rainfair, Inc., 355 U.S. 131, 41 L.R.R.M. (BNA) 2169 (1957).

32. Hill v. Florida, 325 U.S. 538, 16 L.R.R.M. (BNA) 734 (1945).

33. 29 U.S.C. § 158(a) (2002).

or engaging in unlawful concerted acts such as a secondary boycott.[34] Under *Garmon,* therefore, a state also is preempted from adopting regulations or asserting state court jurisdiction as to conduct that arguably constitutes an unfair labor practice under section 8. Thus, for example, a state court cannot assert jurisdiction over a suit to determine the legality of union picketing aimed at pressuring an employer into entering a union shop agreement since the union's conduct is arguably prohibited under section 8(b).[35]

While the "arguably protected or prohibited" standard establishes a broad preemptive sweep, the *Garmon* Court recognized that federal labor preemption should not extend to matters either deeply rooted in local feeling or of mere peripheral concern to the federal scheme.[36] The *Garmon* Court explained that state jurisdiction should not be ousted with respect to compelling state interests, such as the maintenance of domestic peace, in the absence of clearly expressed congressional direction.[37] The "compelling local interests" exception has been recognized primarily with respect to picketing, violence, or other situations involving some type of injury to the person.[38]

Subsection (c) of section 8 provides a different sort of safe harbor for certain types of expression. Section 8(c) states that "[t]he expressing of any views, argument, or opinion, or the dissemination thereof, . . . shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit."[39] Thus, some forms of expression, such as an employer's comments to employees about the possible effects of unionization, made just days prior to an election may not be prohibited even through such a communication may negatively influence employee choice in the election.[40]

C. *The* Machinists *Preemption*

A second strand of NLRA preemption was established in *Lodge 76, International Association of Machinists v. Wisconsin Employment Relations Commission.*[41] This strand stands for the notion that a state

34. 29 U.S.C. § 158(b) (2002).

35. *Garmon,* 359 U.S. at 236.

36. *Id.* at 243–44.

37. *Id.* at 247.

38. *See, e.g.,* Farmer v. United Bhd. of Carpenters, Local 25, 430 U.S. 290, 94 L.R.R.M. (BNA) 2759 (1977) (finding state action for intentional infliction of emotional distress brought against union for alleged outrageous conduct not preempted); Int'l Union, etc. v. Russell, 356 U.S. 634, 42 L.R.R.M. (BNA) 2142 (1958) (finding state regulation of mass picketing and threats of violence not preempted).

39. *See* 29 U.S.C. § 158(c) (2002).

40. *See* DTR Indus., Inc. v. NLRB, 39 F.3d 106, 110–13, 147 L.R.R.M. (BNA) 2705 (6th Cir. 1994) (holding that employer's letter stating that companies that sole-sourced with employer were likely to split their business in the event of unionization was prediction rather than threat and, therefore, fit comfortably into 8(c)'s exception to 8(a) violations).

41. 427 U.S. 132, 92 L.R.R.M. (BNA) 2881 (1976).

may not regulate conduct through legislation or judicial decision, even if the conduct is neither arguably protected nor arguably prohibited by the Act, if it is within a zone of activity that Congress intended to be left open to the free play of economic forces.[42] If *Garmon* finds its theoretical foundation in the notion of the Board's primary jurisdiction,[43] then the *Machinists* preemption finds its roots in the theory of field occupation.[44] At its core, the *Machinists* preemption protects against a state's interference with the policies embedded in the Act itself. This strand of preemption recognizes that important reasons exist for leaving an area unregulated despite Congress' silence on the matter.[45]

The most cited justification for leaving an area unregulated is that Congress intentionally left certain issues to be resolved through "the free play of economic forces."[46] As the argument goes, Congress expressly outlawed certain types of conduct within the NLRA's comprehensive scheme. Thus, Congress' decision to prohibit certain types of conduct while leaving other types unregulated represents an intentional balance between "the uncontrolled power of management and labor to further their respective interests [as adverse parties in a labor dispute]."[47] As the Court has recognized, resort to lawful economic weapons is "part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized."[48] The *Machinists* strand, accordingly, bars state and local governments from recalibrating the equilibrium intentionally crafted by the NLRA.[49] In an apparent attempt to give more meaning to an otherwise abstract preemption test, courts tend to supplement *Machinists* by stating that "[w]hether self-help economic activities are employed by employer or union, the crucial inquiry regarding pre-emption is the same: whether 'the exercise of plenary state

42. *Id.* at 149–52.

43. *See supra* note 27 and accompanying text.

44. *See Allis-Chalmers Corp.*, 471 U.S. at 209 (stating that preemption is appropriate "if the courts discern from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the States.").

45. *See* BEFORT, *supra* note 4, at 433–34.

46. *See, e.g., Machinists,* 427 U.S. at 140 (quoting NLRB v. Nash-Finch Co., 404 U.S. 138, 144 (1971)).

47. *See, e.g.,* Teamsters v. Morton, 377 U.S. 252, 259, 56 L.R.R.M. (BNA) 2225 (1964); NLRB v. Ins. Agents Int'l Union, 361 U.S. 477, 498, 45 L.R.R.M. (BNA) 2704 (1960); see also Howard Lesnick, *Preemption Reconsidered: The Apparent Reaffirmation of* Garmon, 72 COLUM. L. REV. 469, 478 (1972) (stating that "the failure of Congress to prohibit certain conduct warrant[s] [a] negative inference that it was deemed proper, indeed . . . desirable to be left for the free play of contending economic forces. Thus, the state is not merely filling a gap when it outlaws what federal law fails to outlaw; it is denying one party to an economic contest a weapon that Congress meant him to have available.").

48. *Ins. Agents Int'l Union,* 361 U.S. at 489 (holding that, while perhaps not protected by section 7, a union's directive to its bargaining unit members to engage in peaceful, on-the-job activities resulting in interference with their employer's business could not be deemed per se unlawful).

49. *See* Golden State Transit Corp. v. City of Los Angeles, 475 U.S. 608, 619, 121 L.R.R.M. (BNA) 323 (1986).

authority to curtail or entirely prohibit self-help would frustrate effective implementation of the Act's processes.'"[50]

Courts tend to invoke a *Machinists* analysis most frequently when confronted with state laws that have an arguably regulatory effect on the self-help economic weapons available to the parties in a labor dispute. Thus, courts have invoked the *Machinists* preemption to strike down regulations concerning the hiring of permanent replacement workers,[51] the regulation of work slowdowns,[52] and a local government's insistence that a party settle a labor dispute as a precondition to obtaining a franchise license.[53]

Some regulatory statutes withstand *Machinists* scrutiny notwithstanding their impact on the parties' ability to use economic weapons. The Supreme Court, for example, has upheld several state statutes imposing minimum labor standards, even though the statutes may have some effect on the collective bargaining process.[54] The Ninth Circuit upheld government actions establishing prevailing wage standards[55] and a local government's decision to refuse to do business with a company during the pendency of a labor dispute.[56] Finally, the Supreme Court ruled that, notwithstanding the *Garmon* and *Machinists* theories, a state's action survives preemption if the state is acting in its capacity as a proprietor rather than as a regulator. This "market participant" exception is examined in the following section.

D. Boston Harbor *and the Market Participant Exception to Preemption*

In *Building & Construction Trades Council v. Associated Builders & Contractors of Massachusetts/Rhode Island, Inc. (Boston Harbor),*[57]

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50. *Golden State,* 475 U.S. at 615 (quoting *Machinists,* 427 U.S. at 147–48 (quoting R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 380 (1969))).

51. *See* Chamber of Commerce of the United States v. Reich, 74 F.3d 1322, 151 L.R.R.M. (BNA) 2353 (D.C. Cir. 1996) (striking down an Executive Order barring the federal government from contracting with employers who hire permanent replacements during a lawful strike); Employers Ass'n, Inc. v. United Steelworkers, 32 F.3d 1297, 147 L.R.R.M. (BNA) 2004 (8th Cir. 1994) (striking down a state law barring employers from hiring permanent replacement workers in response to a lawful strike).

52. *See Machinists,* 427 U.S. at 132 (finding a state's ban on employees' concerted refusal to work overtime preempted).

53. *See Golden State Transit Corp.*, 475 U.S. at 608 (holding that city's act of conditioning renewal of taxi cab franchise's license on the franchise's concessions in the bargaining process preempted).

54. *See, e.g.,* Metro. Life Ins. Co. v. Massachusetts, 471 U.S. 724, 119 L.R.R.M. (BNA) 2569 (1985) (concluding that a state statute requiring minimum health benefits was not preempted); New York Tel. Co. v. New York State Dep't of Labor, 440 U.S. 519, 100 L.R.R.M. (BNA) 2896 (1979) (refusing to hold that a state statute that provided for unemployment benefits to striking workers was preempted).

55. Dillingham Constr. N.A., Inc. v. County of Sonoma, 190 F.3d 1034, 162 L.R.R.M. (BNA) 2193 (9th Cir. 1999).

56. Alameda Newspapers, Inc. v. City of Oakland, 95 F.3d 1406, 153 L.R.R.M. (BNA) 2257 (9th Cir. 1996) (holding that city's refusal to purchase newspapers from corporation amidst a labor dispute between the company and its employees not preempted).

57. *Boston Harbor,* 507 U.S. at 226–28.

the Supreme Court fashioned a rule that allows state and local governments to take certain actions that traditionally would fall within the zones of *Garmon* or *Machinists* preemption when the government entity acts in a proprietary rather than a regulatory capacity. The *Boston Harbor* exception to preemption is grounded in the concept that "the NLRA was intended to supplant state labor *regulation,* [but] not all legitimate state activity that affects labor,"[58] and that "[p]ermitting the States to participate freely in the marketplace is . . . consistent with NLRA pre-emption principles."[59] As the Court explained, if a state is acting just as a private contractor would act, and, in doing business with other parties, places labor conditions on those parties in a manner that a private contractor lawfully could, then the state is not regulating the workings of the market. Rather, the state is merely participating in that arena in its own self-interest.[60] Government action is not preempted, therefore, if (1) the entity acts in a proprietary capacity and (2) its actions, if undertaken by a private actor, would not offend the NLRA.[61]

The *Boston Harbor* case concerned the validity of a project labor agreement adopted by the Massachusetts Water Resources Authority (MWRA). The MWRA entered into the agreement with the local Building and Construction Trades Council (BCTC) pursuant to the MWRA's contractual obligation to construct treatment facilities that would be used to clean up the Boston Harbor, and which MRWA would own and manage after completion of the project.[62] The agreement recognized the BCTC as the exclusive bargaining agent for all craft employees working on the project, established terms and conditions of employment, and required all covered employees to become union members within seven days of gaining employment.[63] The Court held that enforcement of the agreement was not preempted because the MWRA acted in a proprietary capacity, and because its conduct, if undertaken by a private party, would not be unlawful under the NLRA.[64]

The Court emphasized several attributes of the *Boston Harbor* factual context that led it to determine that the MWRA acted in a proprietary rather than a regulatory capacity. The Court noted that the state, through the MWRA, owned and managed the property in question.[65] The Court also found that the MWRA entered into the project labor agreement in an attempt "to ensure an efficient project that would be completed as quickly and effectively as possible at the lowest cost."[66]

58. *Id.* at 227 (emphasis in original).
59. *Id.* at 230.
60. *See id.* at 233.
61. *Id.* at 230–33.
62. *Id.* at 232.
63. *Id.*
64. *Id.* at 232–33.
65. *Id.* at 227.
66. *Id.* at 232.

And, perhaps most significantly, the MWRA's actions were "specifically tailored to one particular job, the Boston Harbor cleanup project."[67]

Turning to the second prong of its test, the Court determined that the MWRA acted in a way that would be lawful if undertaken by a private actor. The Court saw the MWRA as "acting in the role of purchaser of construction services."[68] As the Court observed, sections 8(e) and 8(f) of the NLRA explicitly authorize private parties to enter into project labor agreements of the type adopted by the MWRA in *Boston Harbor*.[69] The Court thus concluded that the MWRA should not be restricted from managing its own property pursuant to its contractual obligations to the state "when it pursues its purely proprietary interests,"[70] if a private party would be permitted to manage its property in the same manner.[71]

Lower courts have struggled to apply *Boston Harbor* in a way that has given much consistency to the doctrine. Whatever the source of that inconsistency,[72] it seems clear that *Boston Harbor* has spawned a hyper-technical body of case law in which subtle factual differences carry the day. Nevertheless, a close examination of some leading cases in this area reveals some of the critical factors courts consider when analyzing a market participant argument.

One of the most critical factors that courts consider is whether the government's actions are motivated by proprietary concerns or by a desire to set labor policy. The significance of this distinction was raised in *Boston Harbor* itself. There, the Court contrasted the facts of that case with those in *Wisconsin Department of Industry v. Gould Inc.*,[73] where the Court found preempted a state statute that disqualified potential government contractors with three or more unfair labor practice violations. While the MWRA in *Boston Harbor* entered into the project

67. *Id.*

68. *Id.* at 233.

69. 29 U.S.C. § 158(e), (f) (2002).

70. *Boston Harbor,* 507 U.S. at 231.

71. NLRA section 8(f) authorizes private parties in the construction industry to enter into the type of prehire agreement executed by the MWRA in *Boston Harbor*. 29 U.S.C. § 158(f). Prehire agreements are collective bargaining agreements providing for union recognition, compulsory dues or equivalents, and mandatory use of union hiring halls prior to the hiring of any employees. *See* PATRICK HARDEN & JOHN E. HIGGINS JR., THE DEVELOPING LABOR LAW 958–66 (4th ed. 2001). Subsection (f) permits a general contractor's prehire agreement to require an employer not to hire other contractors performing work on that particular project site unless they agree to become bound by the terms of that labor agreement. *Id. See also* Henry H. Perritt Jr., *Keeping the Government Out of the Way: Project Labor Agreements Under the Supreme Court's* Boston Harbor *Decision,* 12 LAB. LAW. 69 (1996) (discussing *Boston Harbor* and project labor agreements).

72. *See* Roger C. Hartley, *Preemption's Market Participant Immunity—A Constitutional Interpretation: Implications for Living Wage and Labor Peace Policies,* 5 U. PA. J. LAB. & EMP. L. 229, 232 (2003) (contending that the Court's opinion does not provide adequate guidance to lower courts since it failed to explain why states should be privileged to act freely in the marketplace).

73. 475 U.S. at 291.

labor agreement out of proprietary management concerns, the statute in *Gould* was motivated by an effort to deter labor law violations.[74]

In many cases, the analysis of this dichotomy is refined into a narrower set of considerations. For instance, several cases have decided the market participant issue by looking to the scope of the state's conduct. If a state's conduct reflects an ad hoc decision and is tailored to one particular project, courts usually hold that the state is acting in a proprietary capacity.[75] On the other hand, if a governmental entity seeks to affect uniform standards of conduct in a manner that smacks of general policy setting, it will have greater difficulty in arguing that it acted as a market participant.[76]

To determine whether a state or local government is participating in the market, courts also will scrutinize the conditions placed on a government's award of a project or fund to an employer to shed light on whether or not the condition seeks to affect conduct that is related to the performance of contractual obligations to the government. In other words, the inquiry rests on a factual finding of whether the law is an effort by the government to contract directly with employers for goods or services. If so, the state's actions are more proprietary in nature and less likely to be preempted.

In *Cardinal Towing & Auto Repair, Inc. v. City of Bedford,*[77] the Fifth Circuit Court of Appeals fashioned many of these principles into a two-part test. The first prong asks whether the government's action reflects its interest in the efficient procurement of needed goods and services as measured against a typical private party in similar

74. *Boston Harbor,* 507 U.S. at 228. Other cases also emphasize the courts' consideration of the motivational source of the government's conduct. *See, e.g., Dillingham,* 190 F.3d at 1038 (holding the state's establishment of minimum apprenticeship standards not to satisfy the market participant standard, in part because the state was not motivated by management concerns; its purpose was to regulate apprenticeship programs and wages paid on public works contracts).

75. *See Boston Harbor,* 507 U.S. at 232 (applying market participant exception where water authority was ordered by court to perform cleanup project in a timely manner); *see also* Cardinal Towing & Auto Repair, Inc. v. City of Bedford, 180 F.3d 686, 693 (5th Cir. 1999) (holding that a city was a market participant when it passed and enforced an ordinance dealing with contract specifications for bidders who wished to perform the city's nonconsensual towing services); Colfax v. Illinois State Toll Highway Auth., 79 F.3d 631, 634–35 (7th Cir. 1996) (concluding that requirement that contractor adhere to area collective bargaining agreement was not preempted by the NLRA).

76. *See Dillingham,* 190 F.3d 1034 (holding that the state sought to regulate, rather than participate, in the market when it established an apprentice prevailing wage law that was not established for a specific project); Reich, 74 F.3d at 1336–37 (invalidating an executive order authorizing the secretary of labor to disqualify employers who hire permanent replacement workers during a lawful strike from certain federal contracts. Commenting on *Boston Harbor,* the court stated that "[s]urely, the result would have been entirely different, . . . if Massachusetts had passed a general law . . . requiring all construction contractors doing business with the state to enter into collective bargaining agreements . . . containing § 8(e) pre-hire agreements."). *Id.* at 1337.

77. 180 F.3d at 686.

circumstances. The second prong asks whether the narrow scope of the challenged action defeats an inference that the primary goal of the conduct is to encourage a general policy result rather than to address a specific proprietary problem.[78] Applying this test, the court found that the city's action of contracting for nonconsensual towing services was not regulatory in nature, but instead constituted a narrowly focused exercise of a proprietary function, and thus was not subject to preemption.[79]

A federal district court in California expressly applied the *Cardinal Towing* test in *Aeroground, Inc. v. City and County of San Francisco,* where the court invalidated an airport commission's rule that compelled employers desiring to conduct business at the airport to abide by a card check procedure as opposed to a Board-supervised election for determining union representation status.[80] One of the flawed aspects of the rule, according to the court, was that it had the effect of controlling the conduct of many employers (such as cargo handlers) and the conditions under which the employers could contract and deal with third parties (most notably, private airlines).[81] The court went on to note that a very different situation would exist if the airport actually was purchasing services from the employers upon whom it placed conditions.[82] Since the rule was aimed at third parties rather than at the direct procurement of goods or services, the court concluded that it resembled a licensing scheme similar to that previously found preempted by the Supreme Court in *Golden State Transit Corp. v. City of Los Angeles.*[83]

The District of Columbia Circuit Court of Appeals, in *Building and Construction Trades Department, AFL-CIO v. Allbaugh,*[84] in contrast, has adopted a line of reasoning that appears to diverge from other decisions in the *Boston Harbor* line of cases. In *Allbaugh,* several labor organizations challenged the validity of an executive order proscribing the prohibiting or requiring of project labor agreements in federally funded construction projects.[85] The court of appeals ruled that Executive Order 13202 constituted proprietary action rather than regulation, even though the order clearly constituted a "blanket,

78. *Id.* at 693.
79. *Id.* at 697.
80. 170 F. Supp. 2d 950, 168 L.R.R.M. (BNA) 2135 (D.N.D. Cal. 2001).
81. *Id.* at 958.
82. *Id.*
83. *See id.* at 957–58 (referring to *Golden State Transit Corp.,* 475 U.S. 608, as a factually similar case. The Supreme Court ruled that the City of Los Angeles' action in conditioning its renewal of a taxi company's license on the company's settlement of a labor dispute with a third-party bargaining agent was invalid under a *Machinists* preemption analysis.).
84. 295 F.3d 28 (D.C. Cir. 2002).
85. *Id.* at 30.

across-the-board rule that 'flatly prohibit[ed]' . . . certain actions on the part of [the government's] contractors and recipients of its financial assistance."[86]

The *Allbaugh* decision appears to depart from other market participant cases in two ways. First, the court of appeals in *Allbaugh* emphasized that the conditions imposed on recipients of federal funds by the executive order were related to the performance of the employer's contractual obligations to the government and, hence, were proprietary in nature even though the executive order operated as a blanket rule rather than an ad hoc decision.[87] Having reached that conclusion, the court then went on to state that "there simply is no logical justification for holding that if an executive order establishes a consistent practice regarding the use of PLAs, it is regulatory even though the only decisions governed by the executive order are those that the federal government makes as [a] market participant."[88] Second, the court asserted that there is no legally significant difference in proprietorship analysis when rules are imposed upon federally *funded* projects than when they are placed upon federally *owned* projects.[89] The court, as support for this conclusion, maintained that because the government is the proprietor of its own funds, when it acts to ensure the most effective use of those funds, it necessarily is acting in a proprietary capacity.[90]

Given the recent vintage of *Allbaugh,* other courts have not yet commented on the D.C. Circuit's novel reasoning. It is arguable, however, that the *Allbaugh* decision does not actually depart from the holding in *Boston Harbor,* even though the decision's reasoning and factual application seem to depart from prior case law. As stated above, the critical inquiry under a *Boston Harbor* analysis is whether the entity acts in a proprietary capacity and whether its actions, if undertaken by a private actor, would offend the NLRA.[91] While several courts look to whether the government's rule applies to a specific project through an *ad hoc* decision,[92] it is arguable that the Court in *Boston Harbor* considered the *ad hoc* facet as just one factor relevant to the analysis and not necessarily a dispositive one. Thus, even though blanket application may weigh heavily against a finding of market participation, *Allbaugh* may not be a wrongly decided case. Still, given the appearance of regulation that a blanket rule casts, it is likely that other factors

86. *Id.* at 35 (quoting *Reich,* 74 F.3d at 1337, but rejecting the holdings of *Reich* and other market participant cases that uniformly applied rules that do not constitute ad hoc decisions by the government and thus do not qualify for the market participant exception).

87. *See Allbaugh,* 295 F.3d at 34–36.

88. *Id.* at 35.

89. *Id.*

90. *Id.*

91. *See supra* note 61 and accompanying text.

92. *See supra* notes 74–75 and accompanying text.

must appear heavily oriented toward market behavior to overcome such a critical element.

III. AB 1889 and *Chamber of Commerce v. Lockyer*

A. *AB 1889*

On September 28, 2000, California enacted AB 1889 as Cal. Stats. 2000, Ch. 872, which added sections 16645 through 16649 to the California Government Code.[93] The preamble of AB 1889 declares:

> It is the policy of the state not to interfere with an employee's choice about whether to join or be represented by a labor union. For this reason, the state should not subsidize efforts by an employer to assist, promote, or deter union organizing. It is the intent of the Legislature in enacting this act to prohibit an employer from using state funds and facilities for the purpose of influencing employees to support or oppose unionization.[94]

AB 1889 prohibits certain employers, state grant and program recipients, and state contractors from using state funds or property to assist, promote, or deter union organizing.[95] AB 1889 provides for injunctive relief, damages, civil penalties, and other appropriate equitable relief for violations of its provisions.[96]

More specifically, sections 16645.2 and 16645.7 apply to recipients of state grant funds and private employers participating in a state program in excess of $10,000 in any calendar year. These sections expressly prohibit those parties from using state funds to assist, promote, or deter union organizing. In addition, these sections require certification from the recipients that the funds will not be used for prohibited purposes and require record keeping sufficient to show that no state funds were used to defray the cost of those activities.[97]

B. Chamber of Commerce v. Lockyer

In *Chamber of Commerce v. Lockyer*,[98] a group of employer organizations and nursing homes challenged the validity of AB 1889. This group of plaintiffs successfully convinced the U.S. District Court for the Central District of California that sections 16645.2 and 16645.7 of that statute are preempted by the NLRA.

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93. CAL. GOV'T CODE §§ 16645–16649 (West 2001).

94. *Id.*

95. *Id.*

96. Cal. Gov't. Code §§ 16645–16645.8 (West 2001).

97. Cal. Gov't. Code §§ 16645.2, 16645.7 (West 2001). In addition to the accounting requirements, AB 1889 also contains clauses that provide for remedies and causes of action. Specifically, the statute contains a provision for compensatory damages and injunctive and equitable relief to the state, as well as a clause that makes employers who violate the statute liable for a civil penalty of up to twice the amount of state funds spent toward assisting, promoting, or deterring the union campaign. *Id.* at §§ 16645.2(d), 16645.7(d). The statute also provides that any state taxpayer can bring a suit under its provisions. *Id.* at § 16645.8.

98. 225 F. Supp. 2d at 1199.

The *Lockyer* district court's preemption analysis encompasses approximately one and one-half pages.[99] In that space, the court quickly rolled out the relevant *Garmon* and *Machinists* preemption strands and described the policy considerations underlying NLRA section 8(c). The district court concluded that AB 1889 is preempted because it regulates employer speech about union organizing even though Congress intended section 8(c) to provide for an atmosphere of "free debate," and because it found the market participant exception inapplicable.[100]

While the Ninth Circuit approached the case more deliberately, it ultimately reached a similar result. The Ninth Circuit determined that AB 1889 represents an unlawful intrusion into an area of labor law that Congress intended to be left unregulated, and, therefore, runs afoul of the *Machinists* preemption doctrine.[101] The appeals court also conducted an examination of the market participant exception and concluded that AB 1889 constitutes regulation rather than proprietary government action.[102] Having determined that AB 1889 is preempted on these grounds, the Ninth Circuit did not discuss the alternative *Garmon* basis asserted for preemption.[103]

A closer examination of AB 1889 in light of fundamental federal preemption principles reveals that the NLRA does not preempt AB 1889. This examination will show that, consistent with the opinions of both courts, California did not act in a proprietary capacity in enacting AB 1889 and the statute is not immune from preemption analysis altogether. As discussed below, however, neither the logic nor the policy underlying the two NLRA preemption tests conflicts with AB 1889. The Ninth Circuit, accordingly, should have reversed the district court's finding of preemption. More significantly at this juncture, the Supreme Court should accept review of this case and correct the Ninth Circuit's error.

IV. AB 1889 and the Market Participant Exception to Preemption

The Ninth Circuit properly applied the principles of *Boston Harbor* in determining that AB 1889 is not insulated from preemption analysis by the market participant exception. Because AB 1889 is a regulatory rather than a proprietary act, it is subject to scrutiny under the *Garmon* and *Machinists* strands of NLRA preemption.

The Ninth Circuit outlined the basic principles of the market participant exception using the facts and reasoning of *Boston Harbor* and

99. *Id.* at 1204–06.
100. *Id.* at 1205.
101. *Lockyer*, 364 F.3d at 1168.
102. *Id.* at 1160–63.
103. *Id.* at 1166 n. 6.

Gould.[104] It then noted that no general rule prevails in the Ninth Circuit for applying the exception, and instead cited several previous Ninth Circuit decisions to illustrate the courts' treatment of the exception and to reach the conclusion that when a state uses its spending power to shape the overall labor market in a manner that is nonproprietary, the exception will not apply.[105]

The Ninth Circuit relied heavily on the two-part test established by the Fifth Circuit in *Cardinal Towing & Auto Repair, Inc. v. City of Bedford.*[106] Consistent with the first prong of this standard, the Ninth Circuit concluded that the statute "does not purport to reflect California's interest in the efficient procurement of goods and services, as measured by the similar behavior of private parties. Rather, the statute's preamble makes clear that the legislative purpose is not procurement, but preventing the state from influencing employee choice about whether to join a union."[107] The appeals court found that AB 1889 also failed the second prong of the *Cardinal Towing* test since "sections 16645.2 and 16645.7 [do not] have a narrow scope or any other element that would indicate that the statute is unrelated to broader social regulation."[108]

While the *Cardinal Towing* test provides one plausible framework for analyzing AB 1889 in terms of the market participant exception, the Ninth Circuit could have reached the same result while applying a more straightforward analysis based on existing precedent. This analysis, as demonstrated below, also supports the conclusion that AB 1889 constitutes regulation rather than proprietary governmental action.

Under prevailing precedent, the market participant exception applies primarily when states act for a proprietary purpose on a specific project.[109] Sections 16645.2 and 16645.7, however, apply broadly to all state grants and programs consisting of $10,000 or more. AB 1889, additionally, does not cite unique needs associated with any particular project. Thus, the statute is not the result of *ad hoc* decision making on the part of the government to tailor its business operations to a particular need. The blanket applicability of this statute without regard to specific circumstances distinguishes AB 1889 from the labor agreement executed in *Boston Harbor.*[110] In contrast, AB 1889 is simi-

104. *Id.* at 1161.

105. *Id.* at 1161–62 (citing the Ninth Circuit's decisions in the *Dillingham, Alameda Newspapers,* and *Seward* cases).

106. 180 F.3d at 693. The *Cardinal Towing* test is discussed *supra* notes 77–79 and accompanying text.

107. *Lockyer,* 364 F.3d at 1163.

108. *Id.*

109. *See supra* notes 75–76 and accompanying text.

110. *See Boston Harbor,* 507 U.S. at 232.

lar to the wage standards in *Dillingham,*[111] the card check rule in *Aeroground,*[112] the executive order in *Reich,*[113] and the statute in *Gould,*[114] all of which were held not to be exempt from preemption analysis because of their broad, general applicability.

Other factors that are pertinent to a finding of market participant status also are absent in the context of AB 1889. Because the statute is not aimed at a single undertaking, its goal, unlike that in *Boston Harbor,* is not as clearly linked to ensuring the efficient and effective performance of a project.[115] Likewise, California cannot be said to own and manage its own property in the same way that the court in *Boston Harbor* perceived the MWRA to own and manage its property.[116] The property that the MWRA managed in *Boston Harbor* was the physical site on which the project was to be consummated. In that way, the MWRA acted "as if it were an ordinary general contractor, like a private buyer of services."[117] In the instant case, California is not purchasing services from the parties it is regulating. Additionally, because the employers subject to AB 1889, not the state, behave in a manner similar to general contractors, California cannot persuasively argue that *it* is acting like a general contractor in enacting AB 1889.

It could be argued that the property that California is attempting to manage in this instance is its purse. This reasoning resonates with the D.C. Circuit's *Allbaugh* opinion. There, the court concluded that the distinction between federally owned and federally funded projects is irrelevant and that a "government is the proprietor of its own funds."[118] Under such a theory, a state or local governmental entity can act as a market participant when it undertakes measures to ensure the most effective use of its own funds even if those measures are taken pursuant to a blanket rule as opposed to an ad hoc decision.[119] The cautionary language of the *Aeroground* opinion, however, undercuts this argument and casts doubt on the legitimacy of such a broad conception of the market participant doctrine:

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111. *See Dillingham,* 190 F.3d at 1034.

112. *See Aeroground,* 170 F. Supp. 2d at 957–58.

113. *See Reich,* 74 F.3d at 1336–37. In *Reich,* the D.C. Circuit Court commented as follows on the likely result under a variation of *Boston Harbor's* facts which look strikingly similar in form to those in *Lockyer*: "[s]urely, the result would have been entirely different, . . . if Massachusetts had passed a general law . . . requiring all construction contractors doing business with the state to enter into collective bargaining agreements . . . containing § 8(e) pre-hire agreements." *Id.* at 1337.

114. *See Gould,* 425 U.S. at 286.

115. *See supra* note 66 and accompanying text.

116. *See supra* notes 65, 70 and accompanying text.

117. *Reich,* 74 F.3d at 1336 (quoting Associated Builders & Contractors of Massachusetts/Rhode Island v. Massachusetts Water Res. Auth., 935 F.2d 345, 366 (1st Cir. 1991) (en banc) (Breyer, C.J., dissenting)).

118. *Allbaugh,* 295 F.3d at 35. The *Allbaugh* decision is discussed *supra* at notes 84–92 and accompanying text.

119. *Id.* at 34–36.

> The [defendant] may have intended the rule solely as a device for increasing the [defendant's] revenues, but simply addressing the financial interests of a public entity does not make such efforts those of a market participant. If that were the case, then every effort by a government entity to increase its revenues could be characterized as market participant. The exception to NLRA preemption established by *Boston Harbor* is much narrower.[120]

Although *Allbaugh* is not without some ground-level appeal, it stands as an outlier in the case law, and the Ninth Circuit likely was correct in refusing to cut across that deep grain in its review of the district court decision in *Lockyer.*

For the foregoing reasons, AB 1889's purpose is aimed at setting a general policy that is regulatory in nature. As such, the Ninth Circuit properly concluded that AB 1889 is subject to preemption analysis.

V. AB 1889 Should Not Be Preempted Under the *Machinists* Preemption Doctrine

In holding AB 1889 preempted by *Machinists,* the district court stated that "AB 1889 is preempted because it regulates employer speech about union organizing under specified circumstances, even though Congress intended free debate."[121] The Ninth Circuit's *Machinists* analysis similarly reflects a deeply rooted concern over maintaining an atmosphere of robust debate in the organizing process.[122] As discussed in more detail below, these decisions are in error because AB 1889 does not bar the free debate contemplated by section 8(c), but simply withholds state financing for such activities.

To its credit, the Ninth Circuit did provide a more thoughtful *Machinists* analysis of AB 1889 than the district court, at least to the extent it discussed several aspects of that strand of preemption and openly considered the relative merits of each party's arguments.[123] After first establishing the basic contexts in which *Machinists* operates, the appeals court proceeded to highlight the backbone of *Machinists*—economic self-help[124]—and the all-important corollary to self-help mechanisms: free and robust debate in union campaigns.[125] Continuing, the court determined that AB 1889, by addressing employer actions that assist, promote, or deter union organizing, targets a process necessary to the functioning of the overall process under the Act.[126]

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120. *Aeroground,* 170 F. Supp. 2d at 958.
121. *Lockyer,* 225 F. Supp. 2d at 1205.
122. *See Lockyer,* 364 F.3d at 1165 (discussing the development of an extensive jurisprudence "emphasizing that open and robust advocacy by both employers and employees must exist in order for the NLRA collective bargaining process to succeed").
123. *Id.* at 1164–68.
124. *Id.* at 1164.
125. *Id.* at 1165.
126. *Id.* at 1166.

The court described state regulation as falling into one of two categories for purposes of the *Machinists* preemption: (1) that which only incidentally affects the organizing process and (2) that which directly targets a process central to union organizing.[127] According to the court, state laws of general applicability, such as those imposing minimum labor standards that are not directed toward altering the bargaining positions of employers or unions but that may have an indirect effect on relative bargaining strength, are not preempted under *Machinists.*[128] On the other hand, laws that directly target the processes of union organizing or collective bargaining, such as the regulations at issue in *Golden State* and *Gould,* are subject to the *Machinists* preemption.[129] According to the Ninth Circuit, state regulation that "directly targets and substantially affects open employer discussion about unionization" is preempted, regardless of the form or method of such state regulation.[130]

AB 1889, according to the appeals court, falls into the impermissible category of direct and substantial state regulation. In support of this conclusion, the Ninth Circuit found that AB 1889 has the explicit purpose of interfering with the NLRA's system for union organizing.[131] Additionally, the court stated that the statute's restriction on the expenditure of state funds, the accounting requirements, and the creation of a private right of action and damage provisions have the actual effect of directly interfering with the organizing process.[132] In sum, the court found that the statute "both substantially and purposefully alters the balance of forces in the union organizing process, interfering directly with a process protected by the NLRA."[133] Based on this conclusion, the court held the statute preempted by federal law.

The flaw in the Ninth Circuit's analysis is not in its delineation of the respective categories of state regulation, but in its placement of AB 1889 in the category of an impermissible "direct and substantial" regulation. AB 1889 does not directly preclude the free debate of any party to a union organizing campaign. The statute does not bar any form of expression, but only restricts the use of state funds as a means

127. *Id.* (citing *Machinists* as Supreme Court precedent in support of this proposition).

128. *Id.* (citing Justice Powell's concurring opinion in *Machinists* for the notion that "[the *Machinists* doctrine] does not . . . preclude the States from enforcing, in the context of a labor dispute, 'neutral' state statutes or rules of decision: state laws that are not directed toward altering the bargaining positions of employers or unions but which may have an indirect effect on relative bargaining strength"). Such state laws are discussed *supra* notes 54–56 and accompanying text.

129. *Id.* at 1167.

130. *Id.*

131. *Id.* at 1168.

132. *Id.* (noting that "an employer who decides against neutrality will incur both compliance costs and litigation risk").

133. *Id.*

of financing such activities. By withholding a state subsidy to employers engaged in either a pro-union or antiunion campaign, the statute levels the playing field in a neutral manner by ensuring that the state is not financing the activities of either party to such a campaign. Although this restriction may have a slight effect on the organizing process for a few employers for whom state financing makes up a considerable portion of their overall budget,[134] the imposition of conditions on the voluntary receipt of government funds is a well-recognized means of safeguarding the expenditures of public funds for public purposes.[135] In a nutshell, AB 1889 neither *directly* nor *substantially* regulates the union organizing process.

More expansively, as discussed below, the Ninth Circuit's holding is incorrect for three reasons: (1) the decision falsely assumed that the *Machinists* doctrine requires the state to subsidize employer speech in a union campaign and, thus, incorrectly equated the state's refusal to subsidize with an unlawful tipping of the scales in favor of unions; (2) AB 1889 in no way prohibits any expression insulated by section 8(c) and employers may engage in such conduct without any impediment other than using state funds to finance its activities; and (3) the decision fails to fully recognize the fact that California's regulatory restrictions on state fund expenditures are legitimate exercises of a government's authority over its own fisc.

Union organizing campaigns often consist of heated battles between employers and bargaining representatives. Embellishments, harsh words, and extreme charges commonly characterize the atmosphere prior to a Board representation election.[136] Rather than policing or censoring this propaganda, the Board and courts recognize that the liberty to speak for a specific cause in the organizational context goes to the heart of the contest over whether an employee chooses to be represented or not.[137] Because it is the employee's ultimate decision as to which position to support, the Court has decided that the employee should make an educated choice after sifting through the free flow of information.[138]

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134. Such a budgetary status, of course, results from the voluntary choices of individual employers rather than by any mandate of AB 1889.

135. *See infra* notes 146–72 and accompanying text.

136. *See Linn v. United Plant Guard Workers of Am., Local 114,* 383 U.S. 53, 58, 61 L.R.R.M. (BNA) 2345 (1966) (stating that "[b]oth labor and management often speak bluntly and recklessly, embellishing their respective positions with imprecatory language"); *see also* Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment,* 43 B.C. L. REV. 351, 372, 410 (2002).

137. *See, e.g.*, NLRB v. TRW-Semiconductors, Inc., 385 F.2d 753, 760, 66 L.R.R.M. (BNA) 2707 (9th Cir. 1967).

138. *See Linn,* 383 U.S. at 60 (stating that the NLRB "leaves to the good sense of the voters the appraisal of such matters, and to opposing parties the task of correcting inaccurate and untruthful statements").

AB 1889, through its prohibition on using state grant and program funds to promote or deter union organizing,[139] does not preclude an employer from engaging in antiunion campaigns. An employer can still fully engage in such a campaign. Nor does the statute penalize or prohibit an employer's efforts to either promote or deter a union's campaign. Rather, the entire regulatory character of the statute takes the form of avoiding the *subsidization* of an employer's efforts to assist, promote, or deter union organizing. AB 1889 merely forbids the use of state money to finance an employer's antiunion campaign. Thus, *Lockyer* is unlike *Golden State Transit Corp. v. City of Los Angeles,*[140] where the Supreme Court invoked the *Machinists* preemption to strike down a city's act of conditioning the renewal of a taxi cab franchise license on the franchise's conclusion of a collective bargaining agreement with a striking union. Here, the governmental action does not compel a party to change prior behavior or make forced concessions to an adversary. The Ninth Circuit is in agreement with this distinction, as it stated that

> [AB 1889] is arguably not restricting self-help by private parties but merely the degree to which state money is used to fund such self-help. Because the California statute regulates no more than the uses to which California's own funds are put, rather than imposing a collateral penalty on additional private behavior not funded by the State, the Supreme Court cases that have found State exercises of the spending power preempted by the NLRA are not directly controlling.[141]

AB 1889 simply maintains a policy of strict neutrality and noninterference that does not impede free-flowing partisan speech.

In refusing to subsidize an employer's union stance, the California legislature recognized that the realities of collective bargaining dictate that local government lacks the authority to define an ideally balanced bargaining paradigm or to introduce a standard of properly balanced bargaining power.[142] The legislation at issue is nothing more than an attempt to avoid the appearance of improper meddling into the parties' relative bargaining power that would likely result when an employer's balance sheet traces its expenditures targeted toward a union campaign back to the state. By refusing to risk that its funds might be used to favor one side over another in a campaign, AB 1889 also attempts to avoid impermissibly "tipping the scales" in favor of one party or another in an organizing campaign. Refusing to subsidize is not the symbolic "thumb on the scale" that one might perceive AB 1889 to be at first glance. Although employers may see the state's withholding of support as a thumb on the scale in support of unionization, a more accurate

139. Cal. Gov't. Code, §§ 16645–16649 (West 2001).
140. 475 U.S. at 608.
141. *Lockyer,* 364 F.3d at 1164–65.
142. *See supra* note 49 and accompanying text.

view of AB 1889 is that the statute discontinues California's past practice of tipping the scales in favor of employers who were permitted to use the state's money to further their own antiunion organizing activities. Reestablishing neutrality in this context necessarily involves withdrawing the support previously given to employers.

As stated above, one of the crucial inquiries regarding preemption is "whether 'the exercise of plenary state authority to curtail or entirely prohibit self-help would frustrate effective implementation of the Act's processes.'"[143] A practical approach to looking into market realities and a straightforward reading of the term "self-help" reveals that AB 1889 simply does not curtail *or* prohibit an employer's use of self-help mechanisms.

It is crucial to recognize that AB 1889 bars no conduct and speaks only to the use of state funds. Under AB 1889, employers can fully and zealously oppose unions in the same manner as prior to the law's enactment. Free debate is no way limited. Employers, moreover, may finance union-free activities from any conceivable source other than the state.

Even if a few employers may not have sufficient resources to finance an antiunion campaign internally and find it difficult to obtain outside funding for such activities, the *Machinists* preemption deals with leaving unregulated the *self-help* mechanisms available to employers and unions. The term "self-help" connotes individual strength and support, not the unbridled deployment of economic weapons obtained from outside sources.[144] Similarly, the plain meaning of "self-help" requires neither a state subsidy nor a different set of rules for those with less economic clout.[145] Because AB 1889 does not curtail or prohibit the self-help mechanisms made available to employers and unions under the NLRA, the California statute does not frustrate effective implementation of the Act's processes.

Finally, California's restrictions on state fund expenditures in AB 1889 should be upheld from the *Machinists* preemption as a legitimate exercise of authority over its own fisc.

Government and private grantors commonly place conditions on the recipients of funds, such as by prohibiting the recipient from using

143. *Golden State Transit Corp.*, 475 U.S. at 615 (quoting Machinists, 427 U.S. at 147–48 (quoting *R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. at 380)); *see also supra* note 50 and accompanying text.

144. *See* Hartley, *supra* note 72, at 249 (stating, "Congress did not intend that union representation decisions should be left to the uncontrolled exercise of either party's relative economic might. To the contrary, the Act favors unencumbered employee free choice.").

145. *See generally* Atlas Metal Parts Co. v. NLRB, 660 F.2d 304, 309, 108 L.R.R.M. (BNA) 2474 (7th Cir. 1981) (ruling that a party does not commit an unfair labor practice when it is able to insist on a favorable bargaining outcome owing to its superior economic strength).

such funds for certain proscribed purposes. As one of many examples, the Supreme Court, in *Harris v. McRae,*[146] upheld the Hyde Amendment that limited reimbursement of Medicaid abortion costs, reasoning that "refusal to subsidize" certain conduct "cannot be equated with the imposition of a 'penalty' on that activity."[147]

The Supreme Court similarly upheld restrictions on the use of government funds in *Rust v. Sullivan,*[148] where recipients of family planning funds under Title X of the Public Health Service Act were precluded from using federal funds in programs in which abortion was a method of family planning.[149] In upholding the restrictions, the Court noted that Congress had "not denied [the fund recipients] the right to engage in abortion-related activities. Congress has merely refused to fund such activities out of the public fisc. . . ."[150] The Court explained that while a ban of the former sort might violate the First Amendment under the "unconstitutional conditions" line of cases, the latter restriction is permissible since the government is allowed more latitude in directing the expenditure of its own funds.[151] *Rust* relied on the Court's earlier decision in *Maher v. Roe,*[152] in which the Court similarly reasoned that, because a state has a strong and legitimate interest in encouraging normal childbirth, a state's decision to subsidize childbirth but not certain abortions is both rational and valid.

Similar to the government's legitimate public interest in *Rust,* AB 1889 also represents a fiscal measure tailored to the preservation of a state's legitimate interests. Here, California possesses a legitimate interest in remaining neutral in organizing campaigns, thereby avoiding the perception that it is aiding one side over another and enabling employee choice in an atmosphere free of government intrusion. California also has a legitimate interest in ensuring that its funds, if accepted, are used for appropriate public purposes. In the enactment of AB 1889, California has made the judgment that while partisan employer speech may further the goal of robust debate in a union organizing campaign, speech that is subsidized by public funds on one side of the debate but not on the other does not further this goal and is not an appropriate use of its purse. California should not be required to subsidize employer speech in union campaigns at the expense of its legitimate local interests, and a refusal to do so cannot be equated with the imposition of a penalty on employer speech.

146. 448 U.S. 297 (1980).
147. *See id.* at 317 n.19.
148. 500 U.S. 173 (1991).
149. *Id.* at 178.
150. *Id.* at 198.
151. *Id.* at 197.
152. 432 U.S. 464 (1977). *See also* Lyng v. UAW, 485 U.S. 360, 369 (upholding the federal government's refusal to subsidize an employee's right of free expression on union matters by disqualifying striking workers from eligibility for food stamps).

While the Ninth Circuit recognized the analogy between cases such as *Rust* and AB 1889's refusal to subsidize employer speech in organizing campaigns,[153] it ultimately concluded that "First Amendment concepts cannot be imported wholesale in construing the NLRA for the purpose of preemption analysis,"[154] and that the constitutional analysis utilized in the *Rust* line of decisions was "inapposite" in the case of AB 1889.[155] The Ninth Circuit offered two explanations for this conclusion. The court first noted that the *Rust* line of cases provide only a manner of reasoning in an analogous context rather than a controlling principle of law.[156] In this regard, the court stated that "[u]se of constitutional doctrine in this area is solely by analogy and we must determine whether [this] analogy to the First Amendment is apt."[157] The appeals court additionally noted that the scope of protected speech under the NLRA is not coextensive with the usual scope of protected First Amendment speech in a nonworkplace setting.[158] In particular, the court noted that speech rights may be subject to more regulation in the workplace setting in order "to protect substantial rights of employees or to preserve harmonious labor relations in the public interest."[159]

The Ninth Circuit's reasoning in rejecting the logic of *Rust* and similar cases is not convincing. First of all, the analogy to *Rust* is very "apt." In both contexts, to paraphrase *Rust,* a governmental entity has not denied fund recipients the right to engage in certain activities but has merely refused to fund such activities out of the public fisc.[160] When such an "apt" analogy to a constitutional standard has been demonstrated, the Supreme Court has not hesitated to embrace that standard as an appropriate line of demarcation for preemption analysis. In *Linn v. United Plant Guard Workers of America, Local 114,* the Supreme Court borrowed constitutional law principles established in the context of defamation jurisprudence in ruling that the NLRA does not preempt state law defamation claims where a claimant can establish that defamatory statements were made with malice and caused actual damage.[161] In reaching this conclusion, the Court stated:

> The standards enunciated in *New York Times v. Sullivan* [citations omitted] are adopted by analogy, rather than by constitutional compulsion. We apply the malice test to effectuate the statutory design with respect to pre-emption.[162]

153. *Lockyer,* 364 F.3d at 1169–70.
154. *Id.* at 1170.
155. *Id.* at 1171.
156. *Id.* at 1170.
157. *Id.*
158. *Id.*
159. *Id.* (citing to NLRB v. Associated Gen. Contractors, Inc., 633 F.3d 766, 772 n.9 (9th Cir. 1980).
160. *See Rust,* 500 U.S. at 198.
161. 383 U.S. at 64–65.
162. *Id.* at 65.

The lack of congruency between usual First Amendment standards relating to speech and those standards regulating speech in the labor relations context also does not serve the Ninth Circuit's conclusion. For one thing, the fact that a number of cases construe speech rights more *narrowly* in the workplace than in other settings hardly justifies the more *expansive* construction of workplace speech rights under section 8(c) as adopted by the Ninth Circuit.[163] Moreover, this lack of congruence underscores the fact that whatever "rights" flow from section 8(c),[164] they necessarily are less weighty than those flowing from the First Amendment. If the analogy utilized in *Rust* and *Linn* is operative in the context of constitutional-based rights, it is difficult to conceive why an otherwise apt analogy is "inapposite" in the context of the more modest safe harbor of section 8(c).

The relative weight of section 8(c) also is diminished by the fact that several federal statutes contain restrictions similar to AB 1889 in terms of prohibiting the use of federal program funds to assist, promote, or deter union organizing.[165] In fact, the Ninth Circuit conceded that there is force to the argument that these federal restrictions, several of which track language identical to that used in the California statute, evidence the legitimacy of AB 1889's similar funding restriction.[166]

The Ninth Circuit nonetheless found that these federal statutes provide a "too ambiguous" basis for inferring congressional intent to permit California's regulation to stand.[167] Specifically, the court noted that the analogous federal statutes target only recipients of certain specific funds, while AB 1889 applies to all recipients of state funds in excess of $10,000.[168]

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163. *See Lockyer*, 364 F.3d at 1170.

164. As discussed *infra* at notes 180–83 and accompanying text, section 8(c) does not create any protected rights, but merely insulates certain types of expression from being deemed an unfair labor practice.

165. *See Lockyer*, 364 F.3d at 1171. The statutes urged by the defendants included: 29 U.S.C. § 2931(b)(7), stating that "[e]ach recipient of funds under [the Workforce Investment Act] shall provide to the Secretary assurances that none of such funds will be used to assist, promote, or deter union organizing"; 42 U.S.C. § 9839(e), stating that "[f]unds appropriated to carry out [the Head Start Programs Act] shall not be used to assist, promote, or deter union organizing; and 42 U.S.C. § 12634(b)(1), stating that "[a]ssistance provided under [the National Community Service Act] shall not be used by program participants and program staff to assist, promote, or deter union organizing." *Lockyer*, 225 F. Supp. 2d at 1205 (quoting 29 U.S.C. § 2931(b)(7) and 42 U.S.C. §§ 9839(e), 12634(b)(1)).

166. *Lockyer*, 364 F.3d at 1171 (going so far as to say that "[h]ad Congress imposed a federal version of sections 16645.2 and 16645.7 with directly analogous spending restrictions on all federal government grants or expenditure, that would weigh significantly against finding preemption here").

167. *Id.* at 1171–72.

168. *Id.* The Ninth Circuit also noted that the analogous federal statutes do not contain the same remedial provisions as AB 1889. *Id.*

The import of these federal statutes, however, is far from ambiguous. As the essence of preemption analysis is to ascertain the intent of Congress,[169] the fact that Congress has enacted a series of funding restrictions substantially similar to AB 1889 provides powerful evidence that Congress does not construe section 8(c) as establishing such an overarching principle of labor-management relations that would preclude reasonable restrictions on governmental funding of union organizing campaigns. Since Congress repeatedly has demonstrated that such funding restrictions can coexist with section 8(c), presumably it also intends that the NLRA not preempt state statutes that operate in a similar fashion.

Perhaps the appeals court is intimating that state funding restrictions do not stand on par with federal funding restrictions.[170] Such a view, however, would be erroneous. Congress, of course, does have the authority under the Commerce Clause to amend the NLRA either directly or by writing exemptions into other laws. [171] But the authority of governmental entities to impose restrictions on the use of their funds does not flow from any unique federal constitutional font. This power, instead, inheres from the basic constitutional authority of governmental entities to regulate the use of their own funds. Absent some special federal restriction, this authority belongs to the states just as it does to the federal government. And, similar to the federal government, states have a legitimate interest in conserving the public fisc to enable states and local units to provide essential public services. In sum, the rationale for the *Machinists* preemption provides no basis to distinguish between federal and state funding restrictions unless the state funding restriction alters the balance of economic forces given free reign by the NLRA.

The court's emphasis on the difference in scope of applicability between the federal statutes and AB 1889 as evidence of preemption also is quite curious, as this characteristic would seem influential only under a market participant analysis. Under existing *Machinists* jurisprudence, the number of employees affected by a state statute ordinarily would not appear to be a relevant factor.[172]

Ultimately, California employers are under no compulsion to seek state contracts or grants. If they voluntarily choose to do so, the attachment of a reasonable spending restriction that bars no employer conduct and only limits the use of state funds to finance one side of an organizing campaign is not inconsistent with the *Machinists* doctrine.

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169. *Malone*, 435 U.S. at 504.

170. While the Ninth Circuit does not explicitly make this argument, the district court opinion did adopt such a distinction. *See Lockyer*, 225 F. Supp. 2d at 1205–06.

171. U.S. CONST. art. VI, cl. 2. (Supremacy Clause).

172. *See supra* notes 41–56 and accompanying text (discussing applicable principles of *Machinists* preemption).

VI. AB 1889 Should Not Be Preempted Under the *Garmon* Preemption Doctrine

Because the Ninth Circuit found the *Machinists* doctrine to preempt AB 1889, it did not reach the question of whether AB 1889 is preempted under *Garmon*.[173] Nonetheless, given this article's opinion that AB 1889 is not preempted under *Machinists* and that the Ninth Circuit wrongly decided that issue, a look into *Garmon*'s effect on AB 1889 is proper, as state regulations must pass muster under both doctrines in order to survive preemption analysis.

As noted above, the *Garmon* test preempts state or local laws only to the extent that they interfere with conduct arguably protected by section 7 or arguably prohibited by section 8.[174] The purpose of this test is to preserve the Board's primary jurisdiction to administer the NLRA.[175]

The district court determined that AB 1889 is preempted under *Garmon* because it prevents the free debate envisioned by section 8(c) of the NLRA.[176] Applying a more rigorous *Garmon* analysis, however, California's statute should not fall to preemption because it does none of the following: First, AB 1889 does not restrict the exercise of section 7 rights. Second, it does not regulate activities that arguably constitute an unfair labor practice under section 8. Finally, in terms of the Board's primary jurisdiction, AB 1889 neither provides an alternative forum for deciding unfair labor practice issues nor imposes an additional remedial scheme in a way that undermines the Board's authority to administer the NLRA.

California's refusal to subsidize partisan employer speech does not interfere with any rights protected by section 7. First of all, it is important to recognize that section 7 confers rights only on *employees*.[177] Thus, to the extent that AB 1889 places some limitation on the manner in which employers can use state funds, that restriction by definition cannot violate any *employer* section 7 rights. The California statute also does not interfere with any employee section 7 rights. In particular, AB 1889 does not restrict an employee's right to support or oppose union

173. *Lockyer*, 364 F.3d at 1166 n.6 (stating "we do not decide here whether such open debate on unionization is an affirmative right that the NLRA itself 'protects,' which would be necessary predicates for a finding of *Garmon* preemption").

174. *See supra* notes 22–23 and accompanying text.

175. *See supra* note 25 and accompanying text.

176. *Lockyer*, 225 F. Supp. 2d at 1204–05.

177. *See* 29 U.S.C. § 157 (2002); *see also* Michael H. Gottesman, *Rethinking Labor Law Preemption: State Laws Facilitating Unionization*, 7 YALE L.J. 355, 379 (1990) ("Section 7 protects only conduct of employees, not employers. Indeed, the Act nowhere vests employers with protected rights; on its face, it forbids certain employer action, but protects none."); Hartley, *supra* note 72, at 248 (stating that "*Garmon*'s protected/arguably protected wing is ill-suited as a preemption theory [in the context of an AB 1889–type policy] because that wing of *Garmon* addresses interference with section 7 rights and employers do not have section 7–protected rights").

organization activities. Even derivatively, the statute does not preclude or frustrate the free flow of information that theoretically leads to employees exercising their section 7 rights through an informed choice regarding representation. As discussed above,[178] AB 1889 does not limit the right of any party to say or do anything in the context of union organizing. It only withholds state funds from subsidizing certain employer activities, but employers are nonetheless free to undertake those same activities with their own funds. AB 1889, quite simply, does not reach activities protected under section 7.

The district court in *Lockyer* justified its *Garmon* preemption holding by stating that AB 1889 interferes with the free debate on labor issues that is contemplated by section 8(c).[179] To argue that AB 1889 interferes à la *Garmon* necessarily assumes that section 8(c) *protects* such speech. Employer speech referenced by section 8(c), however, is *not protected* speech. Section 8(c), by its plain language, does nothing more than bring noncoercive speech out of the ambit of conduct constituting an unfair labor practice.[180] Congress, by including subsection (c) within the section dealing with unfair labor practices, demonstrated its intent to provide an exception to employer speech that otherwise would be prohibited by the Act. Carving out an exception to prohibited conduct is not the same as creating a category of protected conduct.[181] If that had been Congress' intent, then the current section 8(c) language likely would have been enacted as a new section 7(b) instead. The Ninth Circuit itself recognized this distinction in *Hotel Employees, Local 2 v. Marriott Corp.*,[182] where it stated, in upholding an employer's agreement to remain silent during a union organizing campaign, that section 8(c)

> . . . merely states an employer does not commit an unfair labor practice by expressing its views regarding unionization. This provision does not suggest an employer's agreement not to express its views are [sic] unenforceable.[183]

Indeed, the absence of any case law preempting state laws on the ground that they limit protected employer speech under section 8(c) supports the inference that the courts do not view 8(c) as affirmatively protecting noncoercive employer speech. Thus, section 8(c) does not

178. *See supra* notes 143–46 and accompanying text.

179. *See Lockyer*, 225 F. Supp. 2d at 1204–05.

180. Section 8(c) states that "[t]he expressing of any views, argument, or opinion, or the dissemination thereof, . . . shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c).

181. The Supreme Court has explicitly ruled that the protected and prohibited conduct categories are not mirror images of one another. *See* Ins. Agents Int'l Union, 361 U.S. at 477 (holding that while a work slowdown is not protected by section 7, it is not per se prohibited by the NLRA).

182. 961 F.2d 1464 (9th Cir. 1992).

183. *Id.* at 1470 n. 9.

give rise to a protected right that can trigger *Garmon*'s test for federal preemption.

AB 1889 similarly does not regulate any conduct that constitutes an arguable unfair labor practice. The statute only addresses the use of state funds to finance otherwise lawful employer acts.[184] The district court opinion apparently concedes this point as it does not make any claim that AB 1889 runs afoul of this wing of the *Garmon* test.[185]

AB 1889, additionally, does nothing to deprive the Board of primary jurisdiction to determine if activities are arguably prohibited under the NLRA. AB 1889 will not cause California courts to adjudicate unfair labor practice issues under section 8. The California statute will require state courts to determine only if state funds were used in partisan employer speech, not whether such speech was lawful or nonlawful.[186] The two statutes prohibit different conduct, and the dispositive question under AB 1889 is decided independently of any reference to or analysis of sections 7 and 8 of the NLRA.

The Supreme Court's decision in *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters* is instructive on this issue.[187] There, the Court stated that, when conduct that is unlawful under state law may also be viewed as arguably prohibited under the NLRA, preemption is required only to the extent that "the two potentially conflicting statutes were 'brought to bear on precisely the same conduct.'"[188] Just as in *Sears,*[189] the two potentially conflicting statutes in the instant case prohibit different conduct, and preemption is not required.[190]

Finally, AB 1889 survives preemption under *Garmon* because the statute does not frustrate the NLRA's objective of having the Board solely administer a uniform scheme for remedying violations of the NLRA.[191] While AB 1889 does subject employers to a penalty for violating its terms, it does not punish employers for violating the NLRA.[192] On this basis, AB 1889 is distinguishable from the statute invalidated

184. AB 1889 prohibits covered recipients of state funds from using those funds to assist, promote, or deter union organizing. CAL. GOVT. CODE §§ 16645–16649 (West 2001). Any interpretation of the statute that would extend to barring activities prohibited as unfair labor practices by NLRA § 8(a) clearly would be preempted by *Garmon. See supra* notes 32–34 and accompanying text.

185. *See generally Lockyer,* 225 F. Supp. 2d at 1204–05 (finding AB 1889 preempted without invoking the "arguably protected" wing of the *Garmon* analysis).

186. *See* CAL. GOVT. CODE §§ 16645–16649 (West 2001).

187. 436 U.S. 180, 98 L.R.R.M. (BNA) 2282 (1978).

188. *Id.* at 193–94.

189. In *Sears,* the action in state court was brought to determine the lawfulness of certain union activity under the state's trespass law, while the same conduct could have been held to violate certain provisions of section 8 dealing with union unfair labor practices. *See id.* at 187–94.

190. *See supra* notes 23–35 and accompanying text.

191. *See* CAL. GOVT. CODE §§ 16645–16645.8 (West 2001).

192. Gould, 475 U.S. at 282. The *Gould* decision is discussed *supra* at notes 73–74 and accompanying text.

in *Wisconsin Department of Industry v. Gould.*[193] In that case, by enacting a statute barring certain past NLRA violators from entering into contracts with the state, Wisconsin was attempting to punish employers for the same conduct that the Board had found to be in violation of the NLRA.[194] The Supreme Court invalidated Wisconsin's law because it attempted to enforce the NLRA, a responsibility with which the Board is exclusively vested. In contrast, AB 1889 imposes its own remedial scheme based on conduct that is not protected or prohibited by the NLRA. Thus, the statute neither attempts to enforce the NLRA through additional punishment for the same violation nor punishes employers for conduct that the NLRA would protect. AB 1889, therefore, does not intrude upon the Board's primary jurisdiction to administer the remedial scheme set forth in the NLRA and is not preempted under *Garmon.*

VII. Conclusion

The *Lockyer* litigation stands at the cutting edge of NLRA preemption jurisprudence. Its focus of scrutiny, AB 1889, calls into question the reach of both the *Garmon* and *Machinists* strands of labor law preemption as well as the increasingly important, yet unsettled, market participant exception. The Ninth Circuit should have seized this opportunity for "litigating elucidation" to add policy-driven clarity to the frontier of NLRA preemption analysis. For the reasons stated above, we believe that the Ninth Circuit incorrectly decided *Chamber of Commerce v. Lockyer.* Because AB 1889 imposes a blanket rule with respect to state-funded union avoidance activities, the statute acts as a form of regulation that likely does not qualify for *Boston Harbor's* market participant exception to preemption. Nonetheless, the California statute does not violate the core principles and purposes of either the *Garmon* or *Machinists* doctrines. Since AB 1889 neither intrudes upon the Board's primary jurisdiction to administer the NLRA nor interferes with the free play of economic forces in areas that Congress meant to leave unregulated, the legislation should have been sustained. Hopefully, the Supreme Court will exercise the opportunity to correct this mistake.

193. *See id.* at 288–89.
194. *Id.* at 287–89.